

Fair Political Practices Commission
MEMORANDUM

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh and Remy
From: Scott Hallabrin, General Counsel
Subject: Adoption of Proposed Amendments to Regulations 18360 and 18361
Date: May 7, 2008

Proposed Commission Action and Staff Recommendation: Adopt proposed amendments to Regulations 18360 and 18361.

Reasons for Proposals

Regulation 18360. Proposed amendments to Regulation 18360 were presented to the Commission at the January 2008 and February 2008 Commission meetings. In addition, the California Political Attorneys Association made several recommendations regarding this regulation at the Commission's informational hearing on enforcement in April 2008.

As previously indicated by staff, the proposed amendments bring the regulation into conformity with Government Code Section 83115. Section 83115 provides as follows:

“Upon the sworn complaint of any person or on its own initiative, the commission shall investigate possible violations of this title relating to any agency, official, election, lobbyist or legislative or administrative action. Within 14 days after receipt of a complaint under this section, the commission shall notify in writing the person who made the complaint of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for such action or nonaction. If no decision has been made within 14 days, the person who made the complaint shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.”

This statute requires that when a person files a complaint signed under penalty of perjury alleging violations of the Act, the Commission must inform the person within 14 days of the action it intends to take on the complaint and the reasons for the action. If, at the end of the 14-day period, the Commission has not decided what action to take, it must, under the statute, inform the person of the reasons for the delay and provide the person with updated information at 14-day intervals until it finally decides on a course of action.

Existing Regulation 18360 sets forth the procedures the Commission follows to comply with Section 83115. In addition to several technical revisions, staff believes the regulation needs to be substantively modified in several respects. Discussed below are the recommended changes to the regulation.

Initially, staff conforms the language throughout the regulation to that of Section 83115 by using the word “sworn” instead of “formal” to describe a complaint filed with the Commission under penalty of perjury.

Subdivision (a) of the existing regulation only applies the sworn complaint process to complaints alleging violations of the Act at the state level. Section 83115 does not confine its application to alleged state-level violations. Therefore, staff proposes the regulation be modified to apply the complaint process to any alleged violation of the Act, whether at the state or local level. Staff also proposes adding language to clarify that the Commission may investigate complaints on its own initiative.

Subdivision (b) of the existing regulation permits a sworn complaint to be filed by use of either the Commission’s own form or a document created by the complainant that includes specified minimum information. Staff has developed a sworn complaint form, available online, to ensure consistency in format and save staff time in processing these complaints. Also, since the sworn complaint is signed under penalty of perjury, staff proposes adding a provision requiring that the complaint be based on facts of which the complainant has personal knowledge.

Subdivision (c) of the existing regulation permits persons to file “informal” complaints with the Commission. The statute makes no mention of informal complaints and the regulation does not specify their format. Staff proposes modifying the regulation to permit a person who does not desire to file a sworn complaint to supply information concerning possible violations to the Commission by telephone and, at the complainant’s option, do so anonymously. This will save staff time in not only processing unnecessary paper but also in obtaining more focused information on the alleged violation. As clarified in subdivision (a), the Commission retains the ability to investigate possible violations, pursuant to Section 83115, “on its own initiative” and can use this focused information to do so.

Also, the existing regulation requires staff to provide the Commissioners and other interested governmental agencies with information on informal complaints on a regular basis (subdivision (c)) and provide Commissioners with a copy of each sworn complaint (subdivision (d)).

Staff has moved the provisions concerning providing information to and cooperating with other governmental agencies to new subdivision (e). On the issue of providing information on complaints to the Commissioners, staff believes that, to avoid potential due process issues, the Commissioners should be provided with the minimal information necessary to inform them of the matters under consideration by the Enforcement Division. Therefore, staff proposes amending subdivision (d) to define exactly what information will be provided to the Commissioners on both sworn complaints (subdivision (d)(1)) and investigations the Commission is pursuing on its own initiative (subdivision (d)(2)). The amendments also clarify that a Commissioner may receive additional information about a complaint from staff, unless providing the information will compromise his or her impartiality in that matter (subdivision (d)(3)).

Subdivisions (e) through (i) of the existing regulation require the Commission and staff to engage in a potentially elaborate process to arrive at a decision on the action to take on the sworn complaint and notify the complainant of that decision. The process could involve as many as three Commission closed sessions and internal deliberations of indeterminate length. Staff believes most of these procedures are unduly complicated, unnecessarily consume time of the Commission and staff, pose serious due process concerns, and delay providing the information to the complainant required by Section 83115.

Staff therefore proposes eliminating this process and amending the regulation to provide that the Executive Director's response to the complainant as set forth in new subdivision (f)(1) serve as the Commission's statutorily-required response to the sworn complaint. When the Commission informs the complainant it will investigate the complaint, the letter will caution the complainant that the culpability of the person who is the subject of the complaint has not been determined. When the Commission informs the complainant it will take no action on the complaint, the letter will indicate that the complainant can submit additional information. Also in subdivision (f)(2) and (f)(3), staff proposes providing all persons who are the subject of a sworn complaint or Commission-initiated investigation with information on the complaint or investigation unless, based upon specified criteria and a recommendation from the Chief of Enforcement, the Executive Director decides to withhold all or part of the information in the complaint. In some situations, making all or part of this information public could jeopardize an investigation or violate some other provision of law. These provisions allow the Executive Director the flexibility to account for those situations. They further provide that, on sworn complaints, the subject of the complaint will be informed when information about the complaint is withheld and the reasons for it. When information is withheld about a Commission-initiated complaint, the subject of the complaint will not be informed but the Executive Director will submit a memorandum to the Enforcement case file detailing the reasons for withholding the information. Any information withheld will be withheld from all other persons, with the exception of law enforcement agencies, which will be provided the information on a confidential basis.

In new subdivision (g), staff proposes providing a person who files a sworn complaint with continuing information on the status of the case after the Enforcement Division commences an investigation of the complaint.

Staff proposes maintaining the essence of the first sentence in subdivision (i) of the existing regulation, permitting a complainant who disagrees with the Executive Director's decision to take no action on the complaint under subdivision (f)(1)(C) or (D) to direct a request for reconsideration to the Commission. However, the language has been modified to provide that the request must be submitted to the Executive Director, rather than the Chairman, and adds the requirement that a copy of the request be provided to the Chairman and Commissioners. Under the proposed amendments, this would now appear in subdivision (h).

Regulation 18361. Regulation 18361 currently permits the Executive Director, when his or her impartiality may be compromised, to delegate duties under the enforcement provisions of Regulations 18361.1 through 18361.8 to the General Counsel or a Legal Division attorney. Staff proposes amending Regulation 18361 to permit the same for the Executive Director's duties under Regulation 18360.